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NO. 668

IN THE

Supreme Court
Of the United States

OCTOBER TERM, 1963

JOHN A. BROSS, et al.,
Petitioners,

v.

BOARD OF COUNTY SUPERVISORS
OF FAIRFAX COUNTY, VIRGINIA, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

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January 15, 1964

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JURISDICTION

Reference to 28 U.S.C. § 1257(3) was inadvertently omitted from the petition. That sub-section is set forth in the Appendix.

Respondents have contended that the ninety day period within which the petition for certiorari was required to have been filed in this case began to run *not* from the Virginia Supreme Court's denial on September 11, 1963, of the application for rehearing but rather from that court's refusal of the appeal on June 11, 1963. Respondents have cited Virginia Code § 8-476 and *Morgan* v. *Commonwealth*, 115 Va. 943, 79 S.E. 388 (1913), both of which are set forth in the Appendix to Respondents' Brief, to the effect that the rejection of a petition for a writ of error by the Virginia court is final and hence it is from that rejection that the ninety days should run.

This Court has stated:

> A timely petition for rehearing tolls the running of the three-months period because it operates to suspend the finality of the state court's judgment pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties. *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1943).

This Court has also stated:

> The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof. *Bowman* v. *Loperena*, 311 U.S. 262, 266 (1940).

The Virginia statutes and the practice of the Virginia Supreme Court under those statutes permit the filing of a timely application for rehearing. Va. Code § 8-500 and

Rule 5:13 of the Virginia Supreme Court of Appeals provide for petitions for rehearing. (Both § 8-500 and Rule 5:13 are set forth in full in the Appendix hereto.) In practice, the Virginia Supreme Court has interpreted § 8-476 (cited by Respondents) and § 8-500 together as permitting petitions for rehearing and that Court *does in fact entertain them and pass upon them.*

The order of the Virginia Supreme Court refusing the appeal in this case was entered on June 11, 1963 (see p. 21-A of petition). Under Rule 5:13 Petitioners were required to file an application for rehearing within thirty days after entry of the Court's order. Petitioners so filed their application for rehearing on July 10, 1963, (R. 99-107). However, inasmuch as the Virginia Supreme Court was not scheduled to convene until September 9, 1963, the ninetieth day after June 11, 1963, counsel for Petitioners wrote to the Hon. John W. Eggleston, Chief Justice of the Supreme Court of Appeals of Virginia, in order to obtain a written statement as to whether the Virginia Court construed § 8-500 and Rule 5:13 as permitting application for rehearings on the denial or refusal of a writ of error or appeal. The Chief Justice replied by letter dated August 5, 1963, stating in part:

> While I do not recall any opinion of the court directly passing upon the right of the court to entertain such applications, I may say that we have frequently done so.

(The letter of counsel for Petitioners to the Hon. John W. Eggleston and his reply thereto are set forth in full in the Appendix.)

In fact the Virginia Supreme Court has often reconsidered its action in denying a writ of error and in at least one case has subsequently granted an appeal. *Whitlow v. Altis*, Va. Supreme Court of Appeals, unreported, Doc. No.

4555, writ of error denied October 10, 1955, denial set aside November 25, 1955, appeal granted November 29, 1955.

Thus, the Virginia Court in accordance with Virginia Code §8-500 and Rule 5:13, and despite §8-476, does in fact make a practice of entertaining and passing upon applications for rehearings. It did so in this case. Its order denying the rehearing stated that it had given "mature consideration" to the petition to rehear (P. 22-A of petition). Hence the ninety day period ran from September 11, 1963 and this Court should not dismiss this petition for a writ of certiorari for failure to be filed in a timely fashion.

ARGUMENT

I. THE FOURTEENTH AMENDMENT QUESTION.

On Page 7 of its Brief in Opposition, Respondents contend that Petitioners may not assail the constitutionality of the action of the Board of Supervisors since they have themselves not filed an application for a rezoning of their land for high-rise apartment use. Respondents state ". . . only a person whose rights have been affected may assail the constitutionality of legislation." It is clear from the testimony in the record as cited on Page 30 of the petition and from this Court's opinion in the *Euclid* case also cited on Page 30 of the petition and indeed from common sense, that the use of Merrywood for high-rise apartments seriously affects Petitioners' property rights in the enjoyment of their neighboring land. Petitioners are faced with an unreasonable classification of adjoining land. It would be a travesty to require them to apply to the legislative body for the same unreasonable classification of their own land as a prerequisite to complaining of the unreasonableness of the classification of the adjoining land.

CONCLUSION

It is respectfully submitted that the petition for certiorari was submitted within the time allowed by law and that for the reasons stated herein and in said petition, a writ of certiorari should be granted.

Respectfully submitted:

J. SLOAN KUYKENDALL

E. A. PRICHARD

STILSON H. HALL

CLIVE L. DUVAL, II

RICHARD R. G. HOBSON

Counsel for Petitioners

January 15, 1964.

APPENDIX

1. 28 U.S.C. § 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

2. Virginia Code § 8-500 (Michie 1950, 1957 Replacement Vol.)

§ 8-500. Rehearing.—The Supreme Court of Appeals, on the application of a party, shall rehear and review any case decided by such court if one of the judges who decides the case adversely to the applicant certifies that in his opinion there is good cause for such rehearing; provided, however, that the application or petition for rehearing be filed within thirty days after the entry of the judgment, with the court, if the court be in session, and if not in session, shall be filed with the clerk at the place of session where the judgment was entered, who shall note the date of such filing on the order book. Such rehearing made thereon shall be entered on the order book where it is made and if not and review may be at any place of session, and the judgment, decree, or order made at the place of session where the case was pending at the time it was originally determined, it shall be certified to the clerk of the court at the place of session where the case was originally

pending as aforesaid, who shall forthwith enter the same on his order book and transmit a certified copy thereof to the clerk of the court below, to be by him entered as provided by § 8-498. (Code 1919, § 6372, 1930, p. 869.)

3. Rule 5:13 of the Supreme Court of Appeals of Virginia (Virginia Code Vol. 2, Michie 1950, 1962 Supp. to 1957 Replacement Vol.)

No application for a rehearing will be entertained in any case unless twenty-five copies of a printed petition therefor shall be filed in the clerk's office of this court at Richmond and three copies delivered or mailed to opposing counsel within thirty days after entry of the judgment or decree. A party intending to apply for a rehearing shall give written notice to the clerk of this court within ten days after entry of the judgment or decree. If such notice is given, the clerk of this court shall withhold certification of the mandate until time for filing the application has expired and, if the same is filed, until it is disposed of. No such application to rehear and review any case shall be allowed unless one of the Justices who decided the case adversely to the applicant is of opinion that there is good cause for such rehearing. The proceedings upon such rehearing and review shall be in accordance with Code, § 8-500. No oral argument will be permitted on applications for rehearing.

When a rehearing is granted, the case will be placed on the privileged docket for oral argument. The petitioner may not file any brief in addition to the petition for rehearing. The respondent may file a printed brief in reply to the petition within twenty-one days after the date of the order granting the rehearing, but the respondent will be heard orally whether or not he files such brief. The case will be called at the next session of the court after the expiration of the twenty-one days unless counsel agree that it be called at a session of the court commencing at an earlier time.

4. Letter dated August 2, 1963, from Petitioners' Counsel, J. Sloan Kuykendall, to the Honorable John W. Eggleston, Chief Justice of the Supreme Court of Appeals of Virginia.

August 2, 1963

The Honorable John W. Eggleston
Chief Justice
Supreme Court of Appeals of Virginia
301 City Hall Building
Norfolk 10, Virginia

Re: John A. Bross, et al, Petitioners, v. Board of County Supervisors of Fairfax County, et al, Respondents Our File 6269

Dear Mr. Chief Justice:

On the 10th day of July, 1963, a printed application for a rehearing on the petition for an appeal in this case was filed with the Clerk of the Supreme Court of Appeals. This petition was filed pursuant to Rule 5:13 of the Code.

The respondents in this suit filed a motion to dismiss the application for a rehearing, claiming that the order of the Court rejecting the appeal is final and that no application for a rehearing may be entertained by the Court.

It is our view that the Court does have authority to entertain an application for a rehearing of a petition for appeal and it is our understanding that the Court has heretofore entertained applications for rehearings in such cases.

If the Court refuses to grant a rehearing of our petition for appeal we presently plan to apply to the Supreme Court of the United States for a writ of certiorari. Under the rule of that Court a petition for such a writ must be filed within ninety days from the date a petition for appeal is refused or from the date that the Court refuses to grant a rehearing

on a petition for appeal. If, under the State practice, an application for a rehearing on a petition for appeal may not be entertained by the appellate court of the State, it is then necessary that the petition for a writ of certiorari be filed within ninety days from the date the order is entered denying the appeal.

We understand that your Court will not convene until the 9th of September, in Staunton, and it appears, therefore, that it will be too late to file a petition for a writ of certiorari after the Court passes upon our application for a rehearing, unless the Court has construed Section 8-500 of the Code and Rule 5:13 of the Supreme Court of Appeals as permitting applications for rehearing in cases where appeals and writs of error have been denied.

If you believe it proper at this time to advise counsel for petitioners whether the Supreme Court of Appeals of Virginia has committed itself on this question, I would appreciate it if you will let me hear from you at your earliest convenience.

Respectfully,
(s) J. Sloan Kuykendall
J. SLOAN KUYKENDALL

c

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(Appendix Continued on page 6-A)

5. Letter dated August 5, 1963, from Chief Justice John W. Eggleston to J. Sloan Kuykendall, Counsel for Petitioners.

SUPREME COURT OF APPEALS
OF VIRGINIA

301 City Hall Building
Norfolk, Virginia 23510
August 5, 1963

Honorable J. Sloan Kuykendall
40 Rouss Avenue
Winchester, Virginia

Re: John A. Bross, et al. v. Board of County Supervisors of Fairfax County

---

Dear Mr. Kuykendall:

I acknowledge receipt of your letter of August 2 inquiring whether the Supreme Court of Appeals has construed Code, § 8-500 and Rule 13 as permitting applications for rehearing on the denial or refusal of a writ of error or appeal.

While I do not recall any opinion or order of the court directly passing upon the right of the court to entertain such applications, I may say that we have frequently done so.

With best regards,

Sincerely yours,

S John W. Eggleston

JOHN W. EGGLESTON

JWE:W